

IN THE MATTER OF:

NO. 98-63

VS.

RUTHERFORD COUNTY SCHOOL SYSTEM,

Respondent

This matter came on to be heard on the 17th day of February, 1999, the hearing having been set by Order of the Administrative Law Judge on January 8, 1999, and the petitioners, [REDACTED], [REDACTED], appearing on behalf of their son, [REDACTED] and the respondent, Rutherford County School System, being represented by John D. Kitch, with Special Education Director, Penny Hooper present.

(1) Whether [REDACTED] is entitled to continue to receive school system funding for his attendance at the Bill Wilkerson Center or may the school system provide these services by the personnel at the Rutherford County School System.

(2) Whether the parents of [REDACTED] are entitled to reimbursement for mileage in transporting their child to and from the Bill Wilkerson Center when transportation was part of the child's IEP.

(3) Whether insurance payments are to be reimbursed as set forth in the petitioners request.

FACTS

A. Identification to receive Special Education services:

The student, [REDACTED], is a seven (7) year old (D.O.B [REDACTED]) child currently enrolled in the John Coleman School in the Rutherford County, Tennessee School System.

[REDACTED] has been identified as learning disabled as a result of a condition known as Fragile X Syndrome. Fragile X syndrome is an inherited genetic condition associated with mental retardation. It is identified and diagnosed by a break, or weakness, on the long arm of the X chromosome. It is believed that approximately 80% of the boys who inherit the fragile X have mental impairment, ranging from severe retardation to low normal intelligence.

Symptomatic behaviors of the fragile X child include unusual speech patterns characterized by a fast and fluctuating rate and repetitions of sounds, words or phrases. Also, there are usually concerns with failing attention spans, hyperactivity and motor delays.

Inherent in any viable program for the fragile X syndrome child is speech therapy, physical therapy and vocational preparation.

[REDACTED] has been receiving special education services from the Rutherford County School System since 1994 which included summer programs. Transportation has been provided in the summer, at times, by the Rutherford County System. In addition, the parents have been totally involved in assisting the academic growth of their child by providing additional services at various institutions, including the Bill Wilkerson Center in Nashville, Tennessee.

HISTORY OF THE CASE

The Rutherford County School System has been aware of the parents' additional measures taken to improve or enhance the learning of their son, [REDACTED] and the teachers within the Rutherford County System have always readily received materials and information from other professionals who work with [REDACTED].

The controversy from which the petitioners brought their claims for relief through this due process hearing arose when the Rutherford County School System decided, on November 13, 1998, to discontinue co-pay assistance for the Bill Wilkerson Center to assist the student, [REDACTED].

The M-Team met on November 13, 1998, with the parent, [REDACTED], present, after due and lawful notice had been given of the meeting for the purpose of amending the IEP. Mrs. [REDACTED] objected to the desire to stop the Bill Wilkerson program and so noted her objection on the amended IEP. The new IEP provided as a proposed change: "Request an assistive technology evaluation. Add additional occupational therapy and speech language goals. Discontinue therapy co-pay with Bill Wilkerson."

As required by the new IEP, the Rutherford County School System increased speech/language therapy and occupational therapy sessions to take into consideration the loss of the Bill Wilkerson assistance in the program.

The parents noted their objection and filed a request for a due process hearing on November 19, 1998. Each party waived requirements for hearing within 45 days, and the issues were thus set for this hearing.

STATEMENT OF LAW AND DECISION

Under the Individuals with Disabilities Education Act, 20 U.S.C. Section 1400 et seq., a child identified with a disability must be provided a free and appropriate education. This Act requires each state to develop guidelines to insure that the intent and purpose of the Act are placed into effect.

In this case the School System has decided to utilize its own personnel rather than personnel of the Bill Wilkerson Center to meet the requirements of FAPE with this Fragile X syndrome identified child.

While the petitioners believe that Bill Wilkerson personnel would best serve the needs of their child, there is no authority to order the School System to provide a specific individual(s) or program when such services are essential to the provision of FAPE.

Board of Educ. of Scotia-Glenville Central Sch. Dist., 23 IDELR 727; Ludington Area Schools, 20 IDELR 211 (1992).

In the oft-quoted case of Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed. 2d 690, 102 S.Ct. 3034 (1982), the Supreme Court held that the standard for an appropriate education was not the cadillac of the best or most advantageous placement that could be created.

The true standard rests with the ability of the school system to develop an educational placement and/or program that would facilitate educational growth in the student pursuant to the goals and objectives identified in the IEP. The Tennessee standard does not place a greater duty on the school system. Doe v. Tullahoma City Schools, 9 F.3d 455 (6th Cir.1993).

The courts leave no doubt that parents, no matter how well motivated, do not have a right under IDEA to compel the school district to provide a specific program or employ a specific methodology in providing for the education of their identified child.

The parents of [REDACTED] have been and are the shining examples of a united couple seeking to have the very best for their child. They have apparently spared no cost, time or effort in seeking to insure that their son receives an early intensified learning environment, which they know to be the best for a child identified with Fragile X. They have very fittingly provided the Rutherford County School System with suggestions, materials and references from other professionals working with Fragile X syndrome children. Their efforts were received and appreciated by the school system.

The Rutherford County School System has not only identified this student as one for which services are available, they have employed

trained personnel to establish appropriate programs and carry out the objectives throughout the school week.

From the testimony of the personnel working with [REDACTED] it was discovered that:

a. Michelle Pauline Mullen is an occupational therapist who supervises Certified Occupational Therapy Assistants (COTAS) working with [REDACTED], in the Rutherford County School System. Ms. Mullen has a B.S. Degree in Occupational Therapy, which includes sensory integration certification. She is licensed by the State of Tennessee as a registered occupational therapist. Prior to coming to the Rutherford County System in 1996, Ms. Mullen worked with acute and subacute geriatric patients, adolescents and adults at Baptist Hospital, in Nashville, Tennessee. Under the IEP for [REDACTED], the student receives one individual treatment per week consisting of one hour and one co-treatment with speech for 30 minutes. Ms. Mullen states that she is familiar with the services provided at the Bill Wilkerson Center, and the Rutherford County System can provide and does provide the same quality of services. In fact, Ms. Mullen states that [REDACTED] [REDACTED] has made progress under his IEP irrespective of the withdrawal of the Bill Wilkerson services.

b. The COTA working directly with [REDACTED] is Pamela Ann Vague. Ms. Vague was an honor student at Nashville Technology School where she was president of her class. She graduated with an Associates Degree in Occupational Therapy in 1992 and was immediately certified and licensed in the State of Tennessee as a Occupational Therapy Assistant. Her background includes working with Alzheimer, stroke and rehabilitation patients, as well as at the Clover Bottom Center where she worked with severe and profound mental retarded and autistic children. A major part of her work included sensory integration techniques which are a part of the focus set forth in the [REDACTED] IEP.

c. Ms. Gena Rhodes is a speech pathologist working with [REDACTED] and the School. She received a B.S. Degree in communication disorders and a Masters Degree in speech pathology. Ms. Rhodes received her Certificate of Clinical Competence and is Licensed by the State of Tennessee. Ms. Rhodes has only been working with [REDACTED] for three weeks but she feels that progress is being made. Ms. Rhodes sees [REDACTED] three times a week.

It is the opinion of this Administrative Law Judge, upon the testimony of the witnesses, statements of the parties, statements of counsel and the educational record of [REDACTED] that all procedural safeguards were followed in establishing and amending

the current IEP for [REDACTED]. The first objections of the parents came when the co-pay program was stopped for services at the Bill Wilkerson Center. It is apparent that the personnel at the Rutherford County School System have the qualifications, job experience and on-hands ability to meet the needs of this student identified with Fragile X Syndrome. In essence, the program for [REDACTED] is unchanged with the exception that he will not be traveling to another center to receive the same services he can receive within the school setting. Pursuant to the amended IEP, additional occupational therapy and speech pathology have become a part of the program. More importantly, the School System has developed a viable IEP with proper goals and objectives, and the trained professionals of the System are taking the necessary steps to provide a forum for progress. On this basis, the request of the petitioners for a continuation of the co-pay services with Bill Wilkerson is denied.

An additional issue which is troubling arose just prior to the hearing, at the request of the parents, concerning the School System's failure to reimburse the parents for mileage back and forth to the Bill Wilkerson Center during the co-pay period. The School System never considered the issue and the parents never raised the question until after this due process request had been set for hearing.

It is undisputed that the School System benefited by [REDACTED]'s enrollment at the Bill Wilkerson Center. Initially, the Rutherford County School System was not familiar with Fragile X Syndrome, and the Bill Wilkerson Center provided valuable services for the student and the System. Attendance at the Bill Wilkerson Center was listed as an additional program on the IEP of [REDACTED] prior to November, 1998. The Rutherford County School System was, in fact, dependent on the Bill Wilkerson Center to fulfill an integral part of the IEP.

Transportation services must be provided if they are required for the student to receive and meet the goals and objectives of that student's free and appropriate educational plan. Here, the parents were unaware that their son was entitled to have the benefit of transportation services, and the School System simply continued to allow the parents to transport the student without making any attempt whatsoever to give the parents notice of their entitlement. The School System cannot place its obligations on parents who are unaware of their right to entitlements.

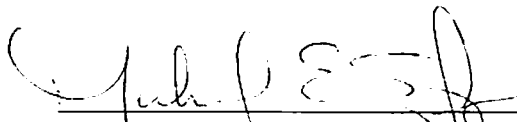
The School System argues that equity must be done on this issue and, yet, comes to the table with unclean hands on this issue. It would be inequitable and circumvent the law to allow the School System to graciously accept free related services from unknowing parents when such services were required under the student's

educational plans and goals. Any full disclosure in this case concerning transportation should have come the date that the school learned that the parents were providing transportation services for the benefit of the school program. There is no ambush in the parent's request as the school suggests; the ambush lies in the failure to inform in the first instance.

Because [REDACTED] required transportation to the Bill Wilkerson Center to his special education program, all as set forth in his individualized educational goals and objectives, the Rutherford County School System shall reimburse the parents for mileage costs which can be verified by attendance records at the Bill Wilkerson Center during such times as attendance at that facility was set forth on the IEP for this student.

The parents' request for insurance reimbursement is not well taken, in that there simply was no proof that failed payments caused incremental costs to these parents. This issue was neither argued nor was there proof set forth to substantiate a ruling in favor of the parents. There the request to reimburse the parents' insurance company is denied.

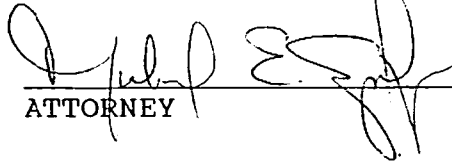
Enter this the 17th day of February, 1999.



MICHAEL E. SPITZER,
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon Mr. and Mrs. [REDACTED]; and upon Mr. John D. Kitch, Attorney at Law, Suite 305, 2300 Hillsboro Pike, Nashville, TN 37212, by enclosing the same in envelopes addressed to them, with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mail box in Hohenwald, Tennessee, on this the 19th day of March, 1999.



ATTORNEY